

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION VII

901 North 5th Street  
Kansas City, Kansas 66101

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ENVIRONMENTAL PROTECTION  
AGENCY-REGION VII  
REGIONAL HEARING CLERK

In the Matter of:

MIDWEST FEEDING CO.  
Milford, Nebraska

Respondent

Proceedings under  
Section 309(a)(3)  
of the Clean Water Act,  
33 U.S.C. § 1319(a)(3)

DOCKET NO. CWA-07-2003-0196

FINDINGS OF VIOLATION  
ORDER FOR COMPLIANCE

Preliminary Statement

1. The following Findings of Violation and Order for Compliance ("Order") are made and issued pursuant to the authority of Section 309(a)(3) of the Clean Water Act ("CWA" or "Act"), 33 U.S.C. § 1319(a)(3). This authority has been delegated by the Administrator of the United States Environmental Protection Agency ("EPA") to the Regional Administrator, EPA Region VII, and redelegated to the Director of Region VII's Water, Wetlands, and Pesticides Division.

2. The Respondent is Midwest Feeding Co. ("Respondent"), who owns and operates an animal feeding operation located in the East ½ of Section 26 and NE ¼ of Section 35, Township 10 N, Range 3E, Seward County, Nebraska.

Statutory and Regulatory Authority

3. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), prohibits the discharge of pollutants except in compliance with, *inter alia*, Section 402 of the CWA, 33 U.S.C. § 1342.

4. Section 402 of the CWA, 33 U.S.C. § 1342, provides that pollutants may be discharged only in accordance with the terms of a National Pollutant Discharge Elimination System ("NPDES") permit issued pursuant to that Section.

5. Section 504(12) of the CWA, 33 U.S.C. § 1362(12), defines the term "discharge of a pollutant" to include "any addition of any pollutant to navigable waters from any point source."

6. To implement Section 402 of the CWA, EPA promulgated regulations codified at 40 C.F.R. Part 122. Under 40 C.F.R. § 122.1, a NPDES permit is required for the discharge of pollutants from any point source into waters of the United States.

7. "Pollutant" is defined by Section 502(6) of the CWA, 33 U.S.C. § 1362(6), to include biological materials and agricultural waste discharged to water.

8. "Point source" is defined by Section 502(14) of the CWA, 33 U.S.C. § 1362(14), to include "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation... from which pollutants are or may be discharged."

9. "Concentrated animal feeding operation" is defined by 40 C.F.R. § 122.23(b)(3) as "an 'animal feeding operation' which meets the criteria in Appendix B of this part."

10. Appendix B to 40 C.F.R. § 122.23 states that an animal feeding operation is a concentrated animal feeding operation if the animal feeding operation confines more than 1,000 slaughter and feeder cattle.

11. "Waters of the United States" are defined in 40 C.F.R. § 122.2 to include intrastate rivers and streams, and tributaries thereto.

12. The Nebraska Department of Environmental Quality ("NDEQ") is the agency within the state of Nebraska with the delegated authority to administer the federal NPDES Program pursuant to Section 402 of the CWA, the Nebraska Environmental Protection Act [Secs. 81-1504 (11), Reissue 1987], and the State of Nebraska Department of Environmental Quality, Title 119, Rules and Regulations Pertaining to the Issuance of Permits Under the National Pollutant Discharge Elimination System. EPA maintains concurrent enforcement authority with delegated state NPDES programs for violations of the CWA.

**Findings of Violation**

13. Midwest Feeding Co. is a corporation and is therefore a person as defined by Section 502(5) of the CWA, 33 U.S.C. § 1362(5).

14. Midwest Feeding Co. operates an animal feeding operation ("Facility") located in the East ½ of Section 26 and NE ¼ of Section 35, Township 10 N, Range 3E, Seward County, Nebraska.

15. On May 21, 2002, EPA conducted an NPDES inspection of Respondent's animal feeding operation.

16. At the time of the inspection, the Facility confined approximately 9,500 cattle. Since at least July 1998, the number of cattle confined at the Facility has been equivalent to at least 1,000 "animal units" as that term is defined in 40 C.F.R. Part 122, Appendix B.

17. From at least July 1998 to the present, the Facility has confined and fed or maintained cattle for a total of 45 days or more in any 12-month period.

18. From at least July 1998 to the present, neither crops, vegetation, forage growth, nor post-harvest residues have been sustained over any portion of the Facility.

19. The Facility is a "concentrated animal feeding operation" as defined by 40 C.F.R. 122.23(b)(3).

20. The Facility is a "point source" as defined by CWA Section 502(14), 33 U.S.C. § 1362(14).

21. On December 11, 1989, NDEQ granted a NPDES Permit for the Facility to Capital City Feedyard, Permit No. NE0052418. The permit had an expiration date of April 11, 1994. On April 14, 1994, NDEQ notified Capital City Feedyard that in accordance with Title 119, Chapter 59, Section 002 of the Nebraska Administrative Code, NDEQ was delaying reissuance of Respondent's permit, and that the conditions of the expired permit would remain in effect from the expiration date until the effective date of a new permit for the Facility. On October 15, 1998, Midwest Feeding Co. formally notified NDEQ that the NPDES permit for the Facility should be transferred from Capital City Feedyard to Midwest Feeding Co. A new permit has not been issued to date, and thus NPDES Permit No. NE0052418 remains in effect for Respondent's Facility.

22. Part I.A. of NPDES Permit No. NE0052418 sets forth the limitations on discharge of pollutants from the Facility, as follows:

A. Discharge shall occur from the overflow of a waste control facility only as a result of runoff from:

a) A precipitation event greater than the 25-year, 24-hour storm (5.3 inches of rain), or

b) Precipitation events from several lesser storms, over a period of time, producing runoff volume exceeding the minimum storage capacity, and suitable disposal conditions do not exist. This occurrence shall be considered a "chronic wet period" and determined by this Department.

23. On June 14, 2001, Respondent's wastewater holding pond overflowed, resulting in the discharge of manure-laden wastewater from the Facility to the Big Blue River. The discharge continued for several days.

24. The discharge was not the result of runoff from a precipitation event greater than the 25-year, 24-hour storm or a "chronic wet period."

25. Groundwater monitoring at the Facility shows that pollutants from the wastewater holding pond are leaking into groundwater. The wastewater holding pond is only fifty meters away from the Big Blue River, and the groundwater beneath the wastewater storage structure is hydrologically connected to the Big Blue River.

26. Pollutants that are leaking into the groundwater from the Facility's wastewater storage structure are being continually discharged into the Big Blue River.

27. The continual discharge of pollutants from the leaking wastewater storage structure at the Facility into the Big Blue River is not the result of a 25-year, 24-hour storm or a chronic wet period.

28. The Big Blue River is a "water of the United States" as defined by 40 C.F.R. § 122.2.

29. Respondent's discharge of wastewater from the Facility to the Big Blue River in June 2001 was not authorized by Respondent's NPDES permit, and thus was a discharge of pollutants from a point source to waters of the United States in violation of Section 301(a) of the CWA, 33 U.S.C. §§ 1311.

30. Respondent's ongoing discharge of pollutants from the Facility to the Big Blue River due to leaks from the wastewater storage structure is not authorized by Respondent's NPDES permit, and thus violates Section 301(a) of the CWA, 33 U.S.C. §§ 1311.

31. Part II.A.1. of Permit No. NE0052418 provides that the Respondent shall pump wastewater from the holding pond to land disposal areas on dewatering days so that minimum storage capacity equal to the expected runoff from the 25 year, 24 hour storm event is made available as soon as possible after a runoff event.

31. Between June 2001 and April 2003, Respondent repeatedly failed to dewater the holding pond at the Facility on dewatering days during time periods when the required minimum storage capacity was not available in the holding pond at the Facility.

32. Respondent's failure to dewater the holding pond at the Facility at times when the required minimum storage capacity was not available in the holding pond is in violation of NPDES Permit No. NE0052418, and a violation of Section 301(a) of the CWA, 33 U.S.C. §§ 1311.

33. Part II.A.1. of Respondent's NPDES Permit No. NE0052418 for the Facility also specifies that prior to the winter months, Respondent shall pump wastewater from the holding pond to land disposal areas in order to make available Minimum Design Capacity sufficient to accommodate snow melt and spring precipitation.

34. In 2001 and 2002, Respondent failed to dewater the holding pond at the Facility so as to make Minimum Design Capacity available prior to the winter months, in violation of NPDES Permit No. NE0052418, and Section 301(a) of the CWA, 33 U.S.C. §§ 1311.

35. Appendix A, Section C(5) of Permit No. 0052418 requires Respondent to orally report within twenty-four hours any discharge of feedlot runoff from his property which may endanger health or the environment.

36. The Respondent did not orally report the June 14-15, 2001 discharge within twenty-four hours, in violation of NPDES Permit No. NE0052418, and Section 301(a) of the CWA, 33 U.S.C. §§ 1311.

37. Appendix A, Section A(4) of Respondent's NPDES Permit No. NE0052418 requires that Respondent monitor and record on a daily basis the liquid level of the wastewater storage structure.

38. From July 1998 until April 2003, Respondent sporadically monitored and recorded the liquid level of the wastewater storage structure, but Respondent did not monitor and record the liquid level on a daily basis, in violation of NPDES Permit No. NE0052418, and Section 301(a) of the CWA, 33 U.S.C. §§ 1311.

### **Compliance Order**

Based on the Findings of Violation set forth above, and pursuant to Sections 309(a)(3) and 311(e) of the CWA, 33 U.S.C. §§ 1319(a)(3), 1321(e), Respondent is hereby ORDERED to take the following actions to eliminate its violations of permit conditions and the CWA:

39. Within ninety (90) days of receipt of this Order, Respondent shall submit to EPA for approval a report conducted by a licensed professional engineer (hereinafter referred to as the "Waste Management Plan") which evaluates the waste handling needs of the Facility and proposes a design for a waste handling system that will enable Respondent to operate in full compliance with the Clean Water Act and its implementing regulations. The waste management system shall be a fully integrated system in which storage capacity is determined based on the amount of wastewater to be controlled, in consideration of the equipment and land available throughout the year for proper disposal of wastewater. Specific items that shall be addressed in the report include, but are not limited to:

- a. An evaluation of minimum storage capacity needed at the Facility to contain the expected runoff from a 25-year, 24-hour precipitation event.
- b. An evaluation of the minimum design capacity needed at the Facility, sufficient to accommodate snow melt and precipitation during winter and early spring months.
- c. An evaluation of the amount of liquid and solid wastes to be disposed of annually by the Facility in an average year, in terms of pounds of solids, gallons of wastewater, and pounds of nutrients.
- d. A year-round evaluation and description of the amount and location of land needed and available for land application of wastes from the Facility. This evaluation should include consideration of agronomic application rates in light of planned cropping practices, and the availability of land application sites throughout the year due to cropping practices. The report shall include a county or USGS map on which the specific land application sites to be utilized by Respondent are identified.

- e. A description of the types and capacities of equipment to be used for removing and land applying both solid and liquid wastes, including an evaluation of how quickly minimum storage capacity can be restored throughout the year following a precipitation event.
- f. An evaluation of whether existing storage capacity is adequate, in light of the facility's disposal capabilities throughout the year
- g. An evaluation and description of siting and construction considerations necessary to prevent lagoon leakage.
- h. Drawings and plans for any necessary proposed waste management improvements for the Facility.
- i. A proposed schedule for expeditious construction of all improvements to the Facility which are needed in order for the Facility to come into and maintain compliance with the requirements of the Clean Water Act.
- j. If Respondent proposes to repair, expand, or otherwise modify the existing wastewater storage structure, a description of how Respondent plans to manage wastes at the Facility during any time period when modifications are being constructed. Respondent shall explain what measures will be implemented so that Respondent remains in full compliance with the Clean Water Act during any time period when modifications are being made at the Facility.

40. Upon review of the Waste Management Plan, EPA may approve the report or decline approval and provide comments. Within thirty (30) days of receiving EPA's comments Respondent shall modify the submission consistent with those comments and resubmit the report for final EPA approval.

41. Immediately upon EPA approval of the Waste Management Plan, Respondent shall submit any required local and/or state construction permit applications for any necessary improvements to the Facility's waste control systems.

42. Upon receipt of any required local/state construction permits, Respondent shall commence construction of the required improvements in accordance with the schedule set forth in the Waste Management Plan, as approved by EPA. Respondent shall notify EPA when construction of any required improvements is completed, and shall include in such notification as-built drawings of the constructed improvements.

43. Respondent shall take all necessary and appropriate actions to maintain required Minimum Storage Capacity as required by Respondent's NPDES permit by dewatering the holding pond when necessary on all dewatering days.

44. Respondent shall take all necessary and appropriate actions to make available Minimum Design Capacity prior to the winter months as required by Respondent's NPDES permit.

45. Respondent shall perform monitoring and recordkeeping of precipitation, land application activities, and holding pond liquid levels, as required by Respondent's NPDES permit.

46. Respondent shall promptly orally report all discharges that occur at the Facility, as required by Respondent's NPDES permit.

#### **Effect of Order**

47. This Order shall not constitute a permit under the CWA. Compliance with the terms of this Order shall not relieve Respondent of its responsibility to obtain any required local, state and/or federal permits.

48. Nothing in this Order shall limit EPA's right to obtain access to, and/or to inspect Respondent's facility, and/or to request additional information from Respondent pursuant to the authority of Section 308 of the CWA, 33 U.S.C. § 1318.

49. EPA may subsequently amend this Order in accordance with the authority of the CWA. For example, EPA may amend this Order to address any noncompliance with the CWA, including, but not limited to, any noncompliance with the requirements of Section 402 of the CWA. In the event of any such subsequent amendment to this Order, all requirements for performance of this Order not affected by the amendment shall remain as specified by this original Order.

50. If any provision or authority of this Order, or the application of this Order to Respondent is held by federal judicial authority to be invalid, the application to Respondent of the remainder of this Order shall remain in full force and effect and shall not be affected by such a holding.

51. All submissions to EPA required by this Order shall be sent to:



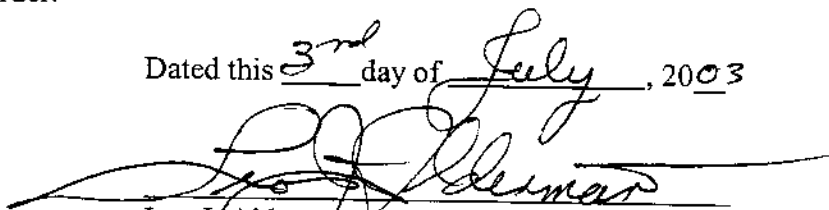
Paula Higbee  
CAFO Enforcement Coordinator  
Water, Wetlands, and Pesticides Division  
U.S. Environmental Protection Agency - Region VII  
901 North 5<sup>th</sup> Street  
Kansas City, Kansas 66101

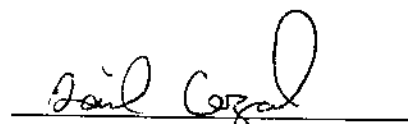
52. Pursuant to 40 C.F.R. §§ 2.201 - 2.311, Respondent may assert a business confidentiality claim covering any portion of the submitted information which is entitled to confidential treatment and which is not effluent data. For any such claim, describe the basis for the claim under the applicable regulation. Any material for which business confidentiality is claimed should be placed in a separate envelope labeled, "Confidential Business Information." Failure to assert a claim in the manner described in 40 C.F.R. § 2.203(b) allows EPA to release the submitted information to the public without further notice. EPA may disclose information subject to the business confidentiality claim only to the extent set forth in the above-cited regulations. Special rules governing information obtained under the Clean Water Act appear in 40 C.F.R. § 2.302.

53. Notice is hereby given that violation of, or failure to comply with, any of the provisions of the foregoing Order may subject Respondent to (1) civil penalties of up to \$27,500 per day for each violation, pursuant to Section 309(d) of the Act, 33 U.S.C. § 1319(d); or (2) civil action in federal court for injunctive relief, pursuant to Section 309(b) of the Act, 33 U.S.C. § 1319(b).

54. The terms of this Order shall be effective and enforceable against Respondent upon its receipt of the Order.

Dated this 3<sup>rd</sup> day of July, 2003

  
Leo J. Alderman  
Director  
Water, Wetlands, and Pesticides Division

  
David Cozad  
Associate Regional Counsel

CERTIFICATE OF SERVICE

I certify that the foregoing Findings of Violation and Order For Compliance was sent to the following persons, in the manner specified, on the date below:

Original and one copy, hand-delivered:

Regional Hearing Clerk  
U.S. Environmental Protection Agency  
Region VII  
901 North 5<sup>th</sup> Street  
Kansas City, Kansas 66101

A original and true copy, together with cover letter and a copy of the Small Business Resources Information Sheet, by certified mail, return receipt requested:

David Dickinson  
Registered Agent  
Midwest Feeding Company  
Rt 1, Box 8  
Milford, Nebraska 68405

Dennis Hietmann  
Nebraska Department of Environmental Quality  
Suite 400, The Atrium  
1200 N Street  
Lincoln, Nebraska 68509-8922

Dated: 7/3/03 Ang Thomas